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No. _____

In the Supreme Court of the United States

CANDELARIO HOLGUIN, JR.,
Petitioner,

v.

RICK THALER,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the state habeas court's finding that the failure of trial counsel to present evidence that the only eyewitness to identify Petitioner suffered from severe vision problems was not ineffective was an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) such that trial counsel should have been found to have rendered ineffective assistance of counsel?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Candelario Holguin, Jr. asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The findings and recommendation of the Magistrate Judge for the Northern District of Texas, Dallas Division are attached to this petition as Appendix E. The order adopting these findings by the United States District Court for the Northern District of Texas is attached hereto as Appendix D. The judgment of the District Court denying Holguin's petition for a writ of habeas corpus is attached as Appendix C. The opinion of the District Court denying Holguin's Application for Certificate of Appealability is attached as Appendix B. The opinion of the Fifth Circuit Court of Appeals denying Holguin's Application for Certificate of Appealability is attached as Appendix A.

JURISDICTION

On July 10, 2009, the District Court denied Holguin's application for a certificate of appealability. The United States Court of Appeals for the Fifth Circuit denied Holguin's certificate of appealability on February 25, 2010. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), Mr. Holguin having asserted below and in this petition the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the right to effective assistance of counsel under the Sixth Amendment to United States Constitution.

   U.S. Const. Amend. VI reads as follows:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. This case involves the proper application of 28 U.S.C. §2254 which reads, in part, as follows:

   (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
   (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Overview

Holguin was indicted by the Dallas County, Texas Grand Jury for three offenses of engaging in organized criminal activity. Holguin entered pleas of not guilty to the indictments and proceeded to trial on all three indictments before a single jury. The jury found Holguin guilty as charged in all three cases. The jury then assessed Holguin's punishment at confinement in the Institutions Division of the Texas Department of Criminal Justice for forty-five (45) years in each case. The trial judge sentenced Holguin in accordance with the jury's verdicts. (Vol. 1: 58-69).

Holguin gave timely notice of appeal to the Court of Appeals for the Fifth District of Texas. Holguin's appeal was subsequently transferred to the Court of Appeals for the Eighth District of Texas. On February 15, 2001, the Court of Appeals affirmed Holguin's convictions. (Vol. 1: 71-140).

Holguin filed petitions for discretionary review in the Court of Criminal Appeals of Texas. On September 12, 2001, the Court of Criminal Appeals refused those petitions. (Vol. 1: 141).

Holguin sought writs of certiorari in the United States Supreme Court. These petitions were denied on February 19, 2002. (Vol. 1: 143; Vol. 2: 452-474).

Holguin filed applications for writs of habeas corpus in the state trial court on January 13, 2003. Holguin amended those applications on April 29, 2005. Holguin filed a supplemental application on March 12,

2007. (Vol. 1: 145-188). The applications for writ of habeas corpus were denied by the Court of Criminal Appeals on April 30, 2008, based on findings entered by the trial court following a hearing. (Vol. 1: 189-264; Vol. 2: 265-291).

On May 29, 2008, Holguin filed a Petition for a Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Northen District of Texas. (Vol. 1: 5-363). On January 8, 2009, the United States Magistrate Judge filed his Findings, Conclusions and Recommendation of the United States, in which he recommended that Holguin's petition for a writ of habeas corpus be denied and dismissed. (Vol. 1: 498-506). Holguin timely filed objections to the Magistrate Judge's recommendation. (Vol. 2: 507-518). On May 8, 2009. the District Judge adopted the Magistrate Judge's recommendation and denied and dismissed Holguin's petition. (Vol. 2: 520-521).

Holguin gave timely notice of appeal from the judgment entered by the District Judge. (Vol. 2: 522). The District Judge, however, denied Holguin's request for a certificate of appealability. (Vol. 2: 534). The Court of Appeals for the Fifth Circuit also denied Hoguin's request for a certificate of appealability.

STATEMENT OF FACTS

Complainant Terry Hughes and Holguin were neighbors. Hughes and Holguin's family lived on the

same block in Irving, Texas. (RR[1] 4: 22-24, 82; RR 5: 27-33; SX-1). Hughes lived at 1522 Mark Street and Holguin lived with various members of his family at 1527 Mark Street, although Holguin was away at school in College Station, Texas, at the time of the alleged offenses. (RR 4: 107, 124, 161; RR 5: 18, 30; SX-1).

On May 30, 1998, Hughes and two friends, complainants Ricky Coats and Paul Verdeja, were attacked by a group of men. (RR 4: 61-83). The attacks occurred around 3:00 a.m., when the complainants were returning to Mark Street from Verdeja's nearby apartment. (RR 4: 98-118).

Hughes and Coats went from Mark Street to Verdeja's apartment around 1:00 a.m. Verdeja and Hughes then drank for several hours (they bought a twelve pack of beer) and discussed Hughes' difficulties with a "punk" (Ventura) who Hughes said was trying to deal drugs with Hughes' son. (RR 4: 103-04, 117, 121, 123-24, 128, 156).

When Hughes and Coats arrived at Verdeja's apartment, Verdeja had already been drinking alone (a pint of whisky plus a prior twelve pack of beer) for about six hours; indeed, Verdeja had a blood-alcohol level of .286 by the time late in the evening when he was attacked. (RR 4: 103-04, 117, 121, 123-24, 128, 156).

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[1] RR refers to the reporter's record from Holguin's trial. The number following is the volume number.

The State presented evidence to show that Holguin and others were the persons who attacked the complainants, but the only witness that told the jury that Holguin was involved was Paul Verdeja. (RR 4: 116-17). Verdeja told the jury that he was sure that Holguin was at the scene (Verdeja said he "got to see his face") even though Verdeja had a blood-alcohol level of at least .286; even though Verdeja initially failed to identify Holguin in photo line-ups shown to him on two occasions within a week after the alleged offenses; and even though Verdeja could not say what clothing Holguin was wearing. (RR 4: 116-17; RR 4: 135-39, 149, 151-54, 161-62; RR 5: 67-69, 137-38, 148; RR 9: 52; SX-10, SX-12-13; DX-2/Ventura). Verdeja told the jury that he saw Holguin when he bent down to check on Hughes, who was on the ground after being attacked. (RR 4: 132, 153). Verdeja said that he believed, but was not sure, that Holguin is the person who hit Verdeja from his "blind side"; Verdeja said that the person hit him with a fist or with an object when he was checking on Hughes. (RR 4: 133-35, 152-54).

The State sought to bolster Verdeja's identification of Holguin by attributing a cellular telephone and pager found at the scene to Holguin. (RR 5: 138-41; SX-21, SX-22, SX-26). The State's witnesses told the jury that the damaged cellular telephone belonged to Holguin's grandmother and that the pager was registered to Holguin. (RR 5: 138-41, 164-68; RR 8: 86). The cellular records were introduced into evidence, but not a single call could be attributed to Holguin. (SX-26). As for the pager, no records were introduced except for a suspicious hand-written notation that the number was assigned to Holguin. (SX-27). Via the testimony of Andy Yi, the pager

company claimed that all records of the account were erased after the hand-written notation was made at the behest of a police investigator. (RR 5: 141, 164-72). The pager introduced in evidence was itself also questioned because one of the investigating officers initially stated, in a written report, that the pager found at the scene was crushed. (RR 4: 31; RR 5: 151). The pager introduced in evidence was not damaged, but the officer disavowed his initial characterization. (RR 5: 91-93; SX-21).

Holguin vigorously, if not effectively, contested his involvement; he presented alibi evidence to show that he was in College Station, several hours from Dallas, at the time of the alleged offenses. In this regard, Holguin introduced records from a video store in College Station showing that he rented a movie at 10:29 p.m. (RR 8: 44-45, 50, 84-106; DX-12/Holguin); he offered testimony from friends in College Station saying that he did not go to Dallas (RR 9: 7-22, 28-33); he contended that Verdeja was mistaken in identifying Holguin due to massive consumption of alcohol (RR 5: 85-97); he presented evidence to show that the investigating officers improperly attempted to coerce and influence witnesses, including Detective Seaton arranging a bond reduction for Ralph Garcia, an important witness to show Holguin's alleged "gang" involvement (RR 7: 122-27), *see* Exhibit 16, and including Detective Seaton inducing and threatening Anna Reyes, Holguin's friend, to make a false statement, disavowed in her trial testimony (the statement said that Holguin planned to see her in Irving on May 30, 1998, but did not show up and later remarked that he lost his pager and telephone), by threatening to arrest her and by leading her to falsely believe that Detective Seaton could have her brother

released from prison (RR 8: 121-23, 129, 164). Holguin presented evidence to show that his grandmother's cellular phone was probably left outside of his house by a relative when Holguin's grandmother, who lived at Holguin's house on Mark Street in Irving, was taken to the hospital late on May 29, 1998. (RR 8: 35-39, 84-98; DX-11/Holguin). Holguin also challenged the pager evidence as suspicious because it was based on a hand-written memorialization of subsequently "erased" computer records (RR 5: 140-41, 168-74); because no physical records were introduced (RR 5: 168-70); and because one officer initially indicated that the pager found at the scene was damaged. (RR 4: 31; RR 5: 151).

The State also sought to suggest that Holguin was at the scene because an automobile that Holguin drove (a Grand Am) was parked outside of his home after the alleged offenses. (RR 4: 35). In response, Holguin presented uncontroverted evidence that the automobile was left in Dallas the week before, and that on May 30, 1998, it was parked with other vehicles in or close to the driveway of his family's house. (RR 8: 96, 102). Holguin returned to Dallas from College Station the weekend before the alleged offenses to pick up furniture. (RR 8: 27-40; RR 9: 12-15). Holguin went back to College Station, with the furniture, in a truck he borrowed from another family member. (RR 9: 12-17).

On this evidence, Holguin was convicted. Subsequently, in a motion for new trial, Holguin argued that Verdeja's medical records, which were in possession of defense counsel at the time of trial, established that Verdeja had a medical condition called purulent end ophthalmitis. (Writ Hearing:39)

At the time of the incident, he would not have been able to clearly view events under the lighting conditions then existing. (Affidavit of Dr. David Stager). When asked about the failure to impeach the sole eyewitness with his then existing eyesight deficiency, defense counsel responded that he did not believe such impeachment would have affected the alibi defense and that defense counsel simply chose not to pursue that avenue of impeachment. (Writ Hearing:33-34).

REASON THE WRIT SHOULD BE GRANTED

The Fifth Circuit Court of Appeals, by denying Petitioner Holguin a certificate of appealability, has denied him his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution because defense counsel's failure to impeach the sole witness to identify Holguin as the assailant with the witness's impaired vision and ability to perceive events was undoubtedly ineffective. On this record, the factual determination that Holguin received effective assistance of counsel was objectively unreasonable. Holguin has raised a question sufficient to merit the granting of a Certificate of Appealability

How the Issue was Decided Below

Holguin's claim for relief, (claims 5-7 in his state writ) were:

Ground Five: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to question Verdeja about his visual acuity at near.

Ground Six: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to investigate the prognosis of Verdeja's case of purulent end ophalmitis.

Ground Seven: Applicant was deprived of his right to effective assistance of counsel because trial counsel failed to present evidence to show the loss of vision arising from Verdeja's case of purulent end ophthalmitis.

The state habeas court findings, adopted by the Texas Court of Criminal Appeals and appended hereto, in part, consist of findings 38-48 that since Verdeja testified that his vision was clear at the time of the offense (finding 38) and because trial counsel felt that impeaching Verdeja on this issue would detract from Holguin's alibi defense, (finding 47) trial counsel was not ineffective. (Finding 48)

The Magistrate Judge's findings which were adopted in toto by the district court, simply disposed of this issue by relying upon the presumption of correctness of the state court findings without further elucidation. (Magistrate Findings 6-7)

The Court of Appeals for the Fifth Circuit ultimately denied relief with a blanket finding that Holguin failed to raise a debatable claim.

Certificate of Appealability– The Legal Standard

To obtain a certificate of appealability, a habeas petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253. This statutory language appears to codify the standard previously announced by this Court in *Barefoot v. Estelle*, 463 U.S. 890, 893 (1983). In *Barefoot*, this Court stated that to obtain an appeal under the former statute, a habeas petitioner must present a substantial showing of the denial of a federal right. The Court further elaborated on the standard for issuance of a certificate in the following language:

> In requiring a question of some substance, or a substantial showing of the denial of a federal right, obviously the petitioner need not show he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Id. at n.4 (citations omitted). This pre-AEDPA language has been reiterated and reinforced in two subsequent opinions, *Slack v. McDaniel*, 529 U.S. 473 (2000), and, more recently, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In *Slack*, this Court reminded that [w]here a district court has rejected the [habeas petitioner's] constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484.

The role of a reviewing court during the certificate of appealability process is *not* to assess the merits of the claim. Rather, as this Court noted in *Miller-El*, when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals *should limit its examination to a threshold inquiry* into the underlying merits of his claim. *Miller-El*, 537 U.S. at 327 (emphasis added). This Court expounded on the screening role of a court under §2253 as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether the resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.*

Id. at 336 (emphasis added).

This Court's interpretation of §2253's screening function prohibits an appellate court from considering, and ruling on, the merits of a habeas petition when the petition is presented as a COA. *Id.* at 342 (reminding

that the COA determination is a separate proceeding, one distinct from the underlying merits).

Doubts about whether to issue a COA should be resolved in favor of the appellant. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); see *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991).

Holguin has made a substantial showing that the findings of the state court, as adopted without comment by the federal courts, are directly contradicted and negated by compelling medical evidence which establish that the lone witness to implicate Holguin suffered from severe vision problems at the time of the offense. Under these circumstances, the factual determination that defense counsel was not ineffective is an objectively unreasonable determination of the facts.

ARGUMENT

Relevant Facts

As stated above, only Paul Verdeja, the victim, identified Holguin as his assailant. (RR4.116-117) In an effort to show the seriousness of Verdeja's injuries, the state introduced his medical records. Among these medical records were entries that prior to the assault, Verdeja had been treated for vision problems. Even though defense counsel admittedly had these records at the time of cross examination, he failed to use them to impeach Verdeja.

In post-conviction proceedings, Holguin, through counsel, obtained the affidavit of Dr. David Stager.

Dr. Stager reviewed the very medical records that defense counsel possessed at trial. Based on his review of these records, Stager provided the court with an affidavit, unrebutted by any other medical evidence, that at the time of the offense, Verdeja "could very well ... not [be] able to clearly view events at night in a dark area. ... and [his] ability to appreciate fine details would be impaired." (Affidavit of Stager, Appendix F).

Based in part on this medical finding, the trial court conducted an evidentiary hearing. At the hearing, Verdeja stated that, in his opinion, his vision was fine, although Verdeja conceded that he had been to the doctor for an eye problem one month before the offense (writ hearing p. 48) and that he was unable to read the chart at his driver's license exam. (writ hearing p. 50-51) However, Verdeja denied that he needed glasses. (writ hearing p. 51) Defense counsel explained that he did not impeach Verdeja with these vision problems because it would detract from the alibi defense. However, defense counsel did concede that "you don't want to leave it, you know, unattacked, the identification of your client." (writ hearing p. 35)

Based on this evidentiary record, the state court found that Verdeja had good vision at the time of trial. In addressing this issue, the state court adopted eleven findings of fact proffered by the prosecutor without addition, deletion, or correction. (Findings 38-48) Not one of these findings mentions the affidavit of Dr. Stager or his unrebutted medical conclusion that Verdeja's vision was impaired at the time of the incident.

As set out above, these state court findings were then adopted in totality by the reviewing federal courts without any meaningful discussion.

Unreasonable Determination

In examining requests for federal habeas corpus relief, the federal appellate courts should review for clear error the findings of facts made by the district court. *House v. Bell*, 547 U.S. 518, 559 (2006) (concurring and dissenting opinion). Pursuant to the federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), deference is given to a state court's adjudication of a petitioner's claims on the merits unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002) (noting that federal habeas relief is merited only if the state court decision is incorrect and objectively unreasonable)

The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of ... [the Supreme Court's] decisions as of the time of the relevant state-court decision." *(Terry) Williams v. Taylor,* 529 U.S. 362 (2000). The inquiry into whether the decision was based on an "unreasonable determination of the facts" constrains a federal court in its habeas review due to the deference it must accord the state court.

Section 2254(d)(2) speaks to factual determinations made by the state courts. *See* 28 U.S.C. §2254(e)(1). While the federal courts presume such determinations to be correct, the petitioner can rebut. Absent an unreasonable determination in light of the record presented in the state court, the federal courts will give deference to the state court's fact findings. §2254(d)(2). *Panetti v. Quarterman*, 551 U.S. 930, 978 (2007).

Failure to Confront the Sole Eyewitness

A number of courts have found deficient performance where counsel failed to challenge the credibility of the prosecution's key witness. *See, e.g., Hamilton v. Zant*, 466 U.S. 989, 993 (1984); *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness"); *Berryman v. Morton*, 100 F.3d 1089, 1099 (3d Cir. 1996) (finding deficient performance where counsel failed to raise the victim's prior inconsistent identification testimony, given that "[t]he reliability of this victim's uncorroborated identification of [the defendant] cut[ ] directly to the heart of the only evidence against [the defendant]"); *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (finding deficient performance where counsel failed to challenge an eyewitness's in-court identification in a case that "hinge[d] on an eyewitness's testimony"); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (finding deficient performance where counsel failed to confront the prosecution's star witness with inconsistent statements, thus "sacrific[ing] an opportunity to weaken the star witness's inculpatory

testimony"); *Blackburn v. Foltz,* 828 F.2d 1177, 1183 (6th Cir.1987) (finding deficient performance where counsel failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness's] testimony was the only plausible hope [the defendant] had for acquittal"). *Beltran v. Cockrell,* 294 F.3d 730, 733 -734 (5th Cir. 2002) (consciously leaving unchallenged sole eye witness to assault); *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006).

Although none of these fact patterns are identical to the instant case, they coalesce to establish a doctrine that failure to impeach the state's key witness is emblematic of ineffective assistance of counsel. Thus, given that federal courts have found deficient performance under analogous scenarios, the factual determinations in this case are objectively unreasonable.

Lack of Strategy

Additionally, the state court's findings are based on a false dichotomy. Far from being inconsistent, the alibi defense and the "visual impairment" theory, which could have been explained to the jury by expert testimony from an opthamologist , support each other. Holguin was not the assailant. Holguin was not present at the time of the assault. In fact, the trial attorney's testimony specifically concedes that there is no strategic value in foregoing impeachment of the state's key witness. In other words, trial counsel understood the importance of the "visual impairment" theory. He just did not present the expert testimony available to him to establish it. Contrary to the findings of fact, it is well settled that such decision making is not accepted as "strategy"

Strickland advises that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Burger v. Kemp*, 483 U.S. 776, 794 (1987)(*citing Strickland*, 466 U.S. at 690-91). "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. at 527 (2002). The Supreme Court has admonished that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* (*citing Strickland*, 466 U.S. at 691). Counsel has an obligation to contact the witnesses and review the reports in advance of trial so that a fair determination of the evidence can be made. *Williams v. Taylor*, 529 U.S. 362 (2000). Failure to follow up on established leads or known defenses, and failure to be prepared to effectively present such defenses, is not excusable. To paraphrase this Court "[t]he right to present, and to have the [factfinder] consider, any and all evidence means little if defense counsel fails to look for evidence or fails to present a case in defense." *Strickland v. Washington*, 466 U.S. 668, 706 (1984). As Justice Stevens noted in his dissenting opinion in *Wood v. Allen*, 130 S.Ct. 841, 853 (2010) "A decision cannot be fairly characterized as "strategic" unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention, or neglect. See *Wiggins*, 539 U.S. at 526, 123 S.Ct. 2527 (concluding that

counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *Strickland,* 466 U.S. at 690-691, 104 S.Ct. 2052. Moreover, "a cursory investigation" does not "automatically justifly] a tactical decision with respect to sentencing strategy." *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527. Although we afford deference to counsel's strategic decisions, *Strickland,* 466 U.S. at 690-691, 104 S.Ct. 2052, for this deference to apply there must be some evidence that the decision was just that: strategic." In this instance, the finding that trial counsel pursued a reasonable strategy is patently erroneous.

Finally, the medical evidence, including the opinion of Dr. Stager, was unrebutted by the state. Only Verdeja's protestations that he could see fine contradicted the great weight of the medical testimony and records. These conclusively established that Verdeja's vision at the time of the assault was necessarily impaired. That the state court utterly failed to mention this evidence is the strongest demonstration that the fact finding was unreasonable in both process and result. In making a reasonable factual determination, the court should look to the record as a whole. See *Wiggins v. Smith*, 539 U.S. 510, 512 (2003). The state habeas court here did not do so, and reasonable jurists could disagree as to whether the decision to disregard the compelling medical evidence resulted in an "unreasonable determination." The United States Court of Appeals for the Fifth Circuit erred in not so finding.

SUMMARY

Petitioner Holguin was convicted on the testimony of one crime victim with vision problems so severe that he lacked the ability to see clearly at night, even from a short distance. However, the jury never heard of that significant deficiency, because trial counsel never mentioned it, even though it was in his records. Trial counsel attempted to excuse this neglect by claiming "trial strategy," even though he was forced to admit that impeachment of the witness was crucial. The state court wrote around the victim's lack of visual acuity by utterly failing to mention the pertinent medical testimony in the findings. These very findings were then improperly accorded complete deference by the reviewing federal courts. Those omissions were, and are, objectively unreasonable within the meaning of 28 U.S.C. §2254(d)(2). No rationale finder of fact would have convicted the Petitioner on the eyewitness testimony of a victim who was essentially night blind. Petitioner has asserted a sufficient basis for his claims to merit appellate review. This relief must be granted.

Respectfully submitted

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